MOTION FILED
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NO. 8687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

VS.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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ATTORNEY FOR AMICUS
CURIAE, HOWARD PERRY

I HEREBY CERTIFY THE WITHIN TO BE A
TRUE AND CORRECT COPY OF THE ORIGINAL
FILED IN THIS CASE
.....
ATTORNEY

IN THE SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,	)	
	)	
PETITIONER	)	
	)	
VS.	)	no. 8687
	)	
ANTHONY SALERNO AND VINCENT CAFARO	)	

CERTIFICATION OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the Motion for Leave to File Amicus Curiae and Brief Amicus

Service by mail on December 30, 1986, three copies each to the following:

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December 30, 1986

Ina C. Brunwasser

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Howard Perry, by his Attorney, Ina C. Brunwasser, respectfully files this Motion and Brief Amicus Curiae in support of Respondents Anthony Salerno and Vincent Cafaro.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

The Applicant, Howard Perry, a petitioner for a Writ of Certiorari before this Court (No. 86-5172, October Term 1986), whose petition was denied on October 6, 1986, hereby applies by Supreme Court Rule 36 (amicus briefs) and Rule 42 (motions) to file the brief of an amicus curiae on behalf of Respondents.

On November 14, 1986, Applicant, in accordance with Supreme Court Rule 36.2, requested the consent of all parties to the filing of an amicus curiae brief at No. 8687, October Term, 1986. On December 1, 1986, Anthony M. Cardinale, Esquire for Respondent Salerno, granted consent to Applicant's filing of an amicus brief. However, on

December 3, 1986, Charles Fried, Solicitor General of the United States, denied such consent. Although, as of the date of filing this motion, Steven K. Frankel, Esquire, Attorney for Respondent Cafaro, has not replied to Applicant's request, consent must be unanimous. Applicant is, therefore, filing the instant motion as required by Supreme Court Rule 36.3.

Applicant's Attorney, Inc. C. Brunwasser, was appointed to represent Howard Perry (forma pauperis) in a petition for Certiorari before this Court at No. 86-5172, October Term, 1986.

Applicant's interest in the case before this Court is to support the position of Respondents by presenting a brief supplementing questions already

submitted to the court and by addressing issues not yet addressed.

Howard Perry was indicted in November and December, 1985 for various drug offenses. Although the intricacies of his case are now irrelevant to the interest of am amicus curiae, the following procedural history of his litigation is necessary to explain his desire to participate.

Since Mr. Perry was charged for an offense punishable by imprisonment for ten years or more under the Controlled Substances Act (21 U.S.C. 801 et seq), he was subject to pretrial detention under the Bail Reform Act, 18 U.S.C. 3142 (e) [the Act]. Mr. Perry was required to rebut the Act's presumption of dangerousness only. Although the United

States District Court for the Western District of Pennsylvania by order of Judge Paul Simmons (December 6, 1985), held that Perry rebutted all presumptions of dangerousness, he has been incarcerated since December 10, 1985 because he was unable to secure the $100,000 bond required by the Court. Although the Court also declared the preventative detention features of the Act unconstitutional, the order does not specifically mention such a ground for decision.

On April 7, 1986, the Third Circuit of Appeals reversed Judge Simmons by holding that (1) The Act is not a violation of the Eighth Amendment, due process, equal protection or the Sixth Amendment (2) Perry failed to rebut the

presumption of dangerousness and, therefore will be detained. The Court did not address the issues of the alleged unconstitutionality of the disparate standards of appellate review employed by various federal courts or the questionable constitutionality posed by the system of presumptions used to detain defendants pending trial.

Perry was convicted at No. 85-263 of all but one charge in April of 1986. In May, Perry plea bargained the second charge (No. 253M). Both cases are now on appeal to the Third Circuit where Perry has asked for new trials. If his request is granted, Mr. Perry will again be subject to the pretrial detention features of the Act.

Although Mr. Perry has been

convicted and is only awaiting the possibility of a new trial (and, therefore, arguably not at present subject to pretrial bail), he asserts that his case is within the following exception cited in Murphy v. Hunt, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982):

> "Even when no more relief may be granted to a plaintiff, a case may...remain viable on appeal if the problem presented is capable of repetition yet evading review. This standard applies if (1) the problem allegedly causing injury is resolved within too short a time period to ever be fully litigated and appealed and (2) the party seeking relief is likely to be subject to the same injury in the future."

See also, Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968); Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct.

705, 712 (1973); Ameron Inc. v. U.S. Army Corp. of Engineers, 787 F.2d 875, 880-881 (3d Cir. 1986).

By comparing the factual situation in Ameron, Inc. v. U.S. Army Corp. of Engineers, 787 F.2d at 875, the most recent case in this Circuit to apply the Murphy v. Hunt rule, 455 U.S. at 478, 102 S. Ct. at 1181, to that of Applicant, it seems clear that Mr. Perry has standing to challenge "the Act". In the Ameron case, 787 F.2d at 881, the Third Circuit held that one prong of the Murphy v. Hunt test [problem resolved before litigation completed] was met, See 455 U.S. at 482, when an unsuccessful bidder challenged the constitutionality of the Competition in Contracting Act (CICA) 131 USCA 3553 et seq (West Supp. 1985), even

after the contract was awarded to another company. Since a bid protest will normally be resolved within 90 days, by the time a case can be appealed, it will almost always face the prospect of being regarded as moot.

Petitioner respectfully asserts that he also satisfies prong one of the Murphy v. Hunt test, 455 U.S. at 478. Because of the 70 day Speedy Trial Rule, every defendant must be brought to trial of his case plea bargained within 70 days. The constitutionality of "the Act" will forever evade review if technical aspects of our judicial system, intended to safeguard civil rights, are used to silence defendants on appeal.

The Third Circuit also held in the Ameron case, 787 F.2d at 881, that

prong two of the Murphy v. Hunt test for standing was satisfied [i.e., there was a reasonable expectation that this party would be subjected to the same action again]. Since the Ameron Company frequently sought government contracts, there was a high probability that it would again protest the awarding of a bid to a competitor. Petitioner contends that if one or both of his appeals result in a remand or new trial or if, in the future, he is charged with an offense under "the Act", he will again be held "dangerous" and be incarcerated.

Therefore, Applicant contends that he has a live interest before the Court either by reason of his pending appeals or as an exception to the rule in Murphy v. Hunt, 455 US at 482.

Respondents principally challenge the Act on due process grounds, Respondents' concern is that the Act punishes defendants by depriving them of liberty upon a mere prediction of future crime. Applicant supports Respondent in this issue. However, Applicant's Brief raises constitutional challenges to the Act which Respondents do not appear to raise. These issues, apparently not presented by the Respondents are:

1. Whether the United States Supreme Court should establish a national standard of appellate review for magistrates' detention orders under the Bail Reform Act (18 USCA 3142)?

2. Whether the Rebuttable Presumption (18 USCA 3142 (e)) is unconstitutional because facially vague

and must therefore be defined for the nation?

3. Whether "the Act" should be declared unconstitutional under the Fifth Amendment, even if the United States Supreme Court supplies a national definition of the term "presumption"?

4. Whether the United States Supreme Court should hold "the Act" unconstitutional when pretrial detention may be wholly founded upon oral testimony which can be rejected by the Court, thus allowing detention based upon a conclusive presumption?

Applicant contends that it is vital that the Court also consider these constitutional challenges to the Act.

In addition, on its facts, Mr. Perry's case illustrates that the Act is

not only detaining alleged high ranking crime figures merely on "clear and convincing evidence of future dangerousness" but also, and, it can be argued, principally, is being used against alleged "small time" criminals.

Applicant was unable to file this motion prior to public announcement on November 3, 1986 that the government's petition for certiorari had been granted.

It is, therefore, respectfully submitted that Applicant's Motion should be granted.

Respectfully submitted,

Ina C. Brunwasser

Ina C. Brunwasser, Esquire
Attorney for Amicus Curiae,
Howard Perry

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Pittsburgh, PA 15228
412-341-0125

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INTEREST OF AMICUS CURIAE

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to a competitor. Petitioner contends that if one or both of his appeals result in a remand or new trial or if, in the future, he is charged with an offense under "the Act", he will again be held "dangerous" and be incarcerated.

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1. Whether the United States Supreme Court should establish a national standard of appellate review for magistrates' detention orders under the Bail Reform Act (18 USCA 3142)?

2. Whether the Rebuttable Presumption (18 USCA 3142 (e)) is unconstitutional because facially vague and must therefore be defined for the nation?

3. Whether "the Act" should be declared unconstitutional under the Fifth Amendment, even if the United States Supreme Court supplies a national definition of the term "presumption"?

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STATEMENT

On November 21, 1985, a Criminal Complaint (No. 85-253M, Ct. of Appeals No. 85-85-3680) was filed charging Howard Perry and Gary Moore with conspiracy to possess heroin with intent to distribute in violation of 21 U.S.C. 841 (a)(1) [1982] and 21 U.S.C. 846 [1982].

Defendant Perry, thereby charged for an offense punishable by imprisonment for ten years or more under the Controlled Substance Act (21 U.S.C. 801 et. seq.), was subject to possible pretrial detention unless he was able to rebut the presumption of dangerousness under the Bail Reform Act, 18 U.S.C.A. 3142 (e) [the Act]. Such hearing was held on November 25, 1985. The

magistrate entered a detention order by virtue of 28 U.S.C.A. 636 (a)(2) [West Supp. 1985].

On November 27, 1985, defendant Perry sought review of the magistrate's order by the United States District Court for the Western District of Pennsylvania pursuant to 18 U.S.C.A. 3145 (b) [West 1985]. On December 5, 1985, District Judge Paul Simmons held a de novo detention hearing, which is the standard of review applied by the Third Circuit. On December 5, 1985, Judge Simmons held the Bail Reform Act substantively and procedurally unconstitutional and orally set bail at $100,000.

During the December 5, 1985 detention hearing before Judge Simmons, all parties learned of a second

indictment against Perry and others (No. 85-263, Ct. of Appeals No. 85-3671), handed down on December 2, 1985, charging them with conspiracy to distribute and possession with intent to distribute cocaine, marijuana and percodan. On the evening of December 5, 1985, Judge Simmons held a second detention hearing on the new charge. Both hearings involved the second rebuttable presumption situation triggered by 3142 (e) of the Act.

During the second detention hearing on December 5, 1985, the United States moved for a stay of the decision to grant bail, which the District Court orally denied.

On December 6, 1985, District Judge Simmons filed an order covering the

two detention hearings held on December 5, 1986. The order held that:

(1) Perry rebutted all presumptions of dangerousness

(2) The United States failed to present any evidence to discount Perry's testimony

(3) Perry would be released temporarily on his own recognizance until December 10, 1985 to secure a $100,000 bond ($50,000 for each indictment).

Although the Court had, in both hearings, declared the preventative detention features of the Act unconstitutional, the order does not specifically mention such a ground of decision.

Unable to secure the bond, Perry has remained in jail since

December 10, 1985.

Perry was brought to trial at No. 85-263 in April of 1986 and was acquitted of the percodan charge but convicted on all other counts. This conviction is now on appeal to the Third Circuit Court of Appeals. In May, Perry plea bargained the second charge (No. 253M). These facts are irrelevant to the constitutional issues raised by the Act's pretrial detention features but are only included as a complete factual synopsis.

The United States appealed the December 6, 1985 order of Judge Simmons in both cases and requested an emergency stay of the order granting release on bail. Perry's Counsel was given until December 13, 1985 to file an answer. However, on December 12, 1985, a panel of

the Third Circuit Court of Appeals granted a stay, prior to the period given Perry to file his answer and expedited the appeal. There was appellate jurisdiction by virtue of 18 U.S.C.A. 3145 (c) [West 1985] and 28 U.S.C.A. 1291 [West 1982].

Oral argument was held on January 17, 1986, subsequent to which the United States moved to dismiss its appeal in No. 85-263. On April 7, 1986, the motion to dismiss No. 263 was granted. Also, on April 7, 1986, after a de novo review of the District Court release order, by virtue only of case law, since no statutory standard of review has been established, see United States v. Coleman, 777 F.2d 888 (3d Cir. 1985) and United States v. Delker, 757 F.2d 1390

(3d Cir. 1985), the Third Circuit reversed Judge Simmons. The Appellate Court held:

(1) The act is not a violation of the Eighth Amendment, Due Process, Equal Protection or the Sixth Amendment.

(2) Perry failed to rebut the presumption of dangerousness and, therefore, will be detained. The Court did not address the issues of the alleged unconstitutionality of the disparate standards of appellate review employed by various federal courts or the questionable constitutionality posed by the system of presumptions used to detain defendants pending trial.

On April 30, 1986, a timely petition for rehearing was denied by the

Third Circuit.

On July 1, 1986, a petition for an extension of time within which to file the writ of certiorari was granted to and including July 29, 1986.

SUMMARY OF ARGUMENT

1. The Circuit Courts of the United States are applying disparate standards of review for magistrates' detention orders under the Bail Reform Act [18 U.S.C. 3142 (e)] because the Act is silent regarding the standard of review to be applied to these orders. A national standard of appellate review should be pronounced by this court to preserve uniform justice.

2. The Circuits, without

guidelines from the Act regarding the meaning of the word "presumption", are devising disparate procedural requirements. The initial constitutional problem is whether the term "presumption" requires defendants to meet the difficult "burden of persuasion" or only a "burden of production". There is also disparity regarding the procedure required under the "burden of production" standard.

It is urged that this conflict be eliminated by this Court's defining which of the two standards is meant and if the "burden of production standard" is approved, which of its several theories is meant by the Act.

3. Even if this Court supplies a national definition of the term "presumption", the Act should still

be declared unconstitutional.

Federal Courts have ruled presumptions violative of criminal due process. The Act is triggered by a criminal charge and, therefore, its presumptions appear to fall within the realm of criminal due process. However, although triggered by a criminal charge, the Act results in civil detention. Presumptions have also been held to violate the less stringent constitutional requirements of civil due process.

4. Pretrial detention can be ordered if the Court holds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community..."

Because the Act does not

require any written evidence, oral testimony, alone, may be used to support the defendant's future capacity for dangerousness.

The rules of evidence allow the Court to totally reject even uncontroverted oral testimony which it views as inherently improbable, unreasonable or questionable.

If oral testimony is rejected, the "presumption" alone will result in pretrial detention.

ARGUMENT

1. Whether the United States Supreme Court should establish a national standard of appellate review for magistrates' detention orders under the Bail Reform Act [18 U.S.C.A. 3142 (e)]?

Although appeal from a

detention order, either that signed by a magistrate or district judge, is allowed by 18 U.S.C.A. 3145 (c), the Act is silent regarding the standard of review to be applied to these orders. The Act's legislative history makes no mention of this issue. See U.S. v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985). Without such guidance, the (federal) courts are forced to act beyond their authority as legislators. See Giaccio v. State of Pennsylvania, 382 US 399, 86 S. Ct. 518 (1966).

The Act's failure to provide any guidance to the courts in this regard has resulted in three different standards of review among the Circuits. The Third, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits apply a de novo

standard of review. See United States v. Delker, 757 F.2d 1390, 1399-1400 (3rd Cir. 1985); United States v. Hazime, 762 F.2d 34, 36-37 (6th Cir. 1985); United States v. Maull, 773 F.2d 1479, 1487 (8th Cir. 1985); United States v. Montamedi, 767 F.2d 1403, 1406 (9th Cir. 1985); United States v. Hurtado, 779 F.2d 1967, 1472 (11th Cir. 1985); United States v. Portes, 786 F.2d 758, 763 (7th Cir. 1985). As stated in Chrysler Corp. v. Brown, 441 US 281, 288, 99 S. Ct. 1705, 1711 (1979), de novo means "a whole new beginning". De novo review is the most harsh of the three standards for defendants to overcome. In the instant case (U.S. v. Perry), the de novo standard was applied both by the District Court and by the Circuit.

In the Second and Fourth Circuits, a district judge will not overturn the magistrate's detention or release order unless it is held "clearly erroneous". See United States v. Chimurenga, 760 F.2d 400, 405 (2nd Cir. 1985); United States v. Williams, 753 F.2d 329, 333 (4th Cir. 1985).

The First and Fifth Circuits have adopted the "supported by the proceeding below" standard of review. The order of the lower court (or magistrate) will not be overturned as long as it is supported by some evidence.

These disparate review standards result in unequal justice for defendants similarly situated. In addition, without guidance from the Act, judges are forced to legislate in

violation of the separation of powers doctrine.

Liberty, the most fundamental of constitutional rights, which is lost if pretrial detention is erroneously ordered, will be more uniformly preserved if this Court supplants the Act's silence regarding the standard of appellate review by a uniform rule.

2. Whether the rebuttable presumption [18 U.S.C.A. § 3142 (e) is

(a) Unconstitutional because facially vague and

(b) Must, therefore, be defined for the nation?

The Act, at 3142 (e) sets out two situations which trigger a presumption of dangerousness and/or flight which result in a defendant's

pretrial incarceration unless such presumption can be rebutted by "clear and convincing evidence".

In the instant case, Defendant Perry has standing to challenge the constitutionality of the second of these two rebuttable presumptions, although the same arguments relevant to Perry would apply to the first rebuttable presumption.

Once Perry was charged with a drug offense punishable by imprisonment of ten years or more by the Controlled Substances Import & Export Act (21 U.S.C. 955a), he was required to rebut the presumption of dangerousness by proving future model conduct (an almost impossible burden) or be incarcerated pending trial.

Since the Act, on its face, provides no guidelines regarding the meaning of the word "presumption", those federal courts which have been faced with a case under the Act, were forced to determine what procedure is required by the undefined word "presumption".

The initial constitutional problem is whether the term "presumption" requires defendants to meet the difficult "burden of persuasion" or only a "burden of production". In the former, the defendant must persuade the court of a future negative (that he will not be a danger, for example). In the latter, the defendant must only go forward with some evidence contrary to a presumed fact.

The confusion among the circuits as to the procedural

requirements of the Act's "presumption" is evidenced by the Third Circuit opinion in Perry. The government, in Perry, urged the Circuit to adopt the stringent "burden of persuasion" standard. Id. The Third Circuit's decision not to reach this constitutional question reveals the confusion which the Act's vagueness is causing. Other Circuits have raised this definitional problem but, like the Third Circuit, were able to bypass decision on the presumption issue by deciding the case on other grounds. See U.S. v. Leon, 766 F.2d 77, 81 (2nd Cir. 1985) and U.S. v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985).

Although no circuit has yet defined "presumption" under the burden of persuasion standard, the Act's total

silence regarding the term's meaning allows for this result, unless the Supreme Court sets a national definition to assure uniform justice.

Even among those circuits which have, so far, held "presumption" to mean "burden of production", there is disparity regarding the procedure required even under the less stringent "burden of production" standard.

The circuits, at present, are applying the burden of production theory using two methods. The First and Fifth Circuits, for example, have held that the presumption is only one of several factors to be considered and is to be weighed equally with other rebuttal evidence submitted by the defendant. See United States v. Jessup, 757 F.2d 378

(1st Cir. 1985) and United States v. Fortna, 769 F.2d 243 (5th Cir. 1985). Other circuits are applying the less stringent "bursting bubble" burden of production presumption. Under this theory, the presumed against party must introduce some rebuttal evidence which production bursts the presumption. The judge (in a detention hearing) must then examine the evidence without any reference to the presumption. See Legille v. Dann, 544 F.2d 1, 6 (D.C. Cir. 1976).

The "bursting bubble" theory of presumptions is the most widely followed theory of presumptions in American law. See Legille v. Dann, 544 F.2d at 6. This standard has been adopted by the Federal Rules of Evidence. See FRE 301. The "bursting bubble" view of presumptions is

also the rule in the United States Supreme Court. See New York Life Insurance Company v. Gamer, 303 U.S. 161, 170-171, 58 S. Ct. 500, 503 (1938). "Presumption of death by accident rather than by suicide is not evidence and ceases upon the introduction of substantial proof to the contrary ... The presumption is not evidence and may not be given weight as evidence".

For these reasons, it is urged that, if the court is to approve any use of "presumptions" under the Act, the "bursting bubble" view should be adopted.

3. Whether the Act should be declared unconstitutional under the Fifth Amendment, even if the United States Supreme Court supplies a national definition of the term "presumption"?

The Fifth Amendment states:

> "No person shall be... deprived of life, liberty or property, without due process of law".

Several appellate courts have held presumptions to be due process violations under either the Fifth or Fourteenth Amendments.

Federal Courts have ruled presumptions invalid as violations of criminal due process. The only case, so far, which has held the Act unconstitutional (though on qualified grounds), is U.S. v. Melendez-Carrion, 790 F.2d 984 (2nd Cir. 1986). Melendez-Carrion, id., held that 3142 (e) of the Act violated due process, at least where such detention lasted for more than eight months. The Melendez-Carrion court did

not establish what constituted an "excessive period" of detention. However, the basis for the holding in Melendez-Carrion, 790 F.2d at 988, was the circuit's aversion to any conviction triggered by a presumption. The Melendez-Carrion court, 790 F.2d at 1004, cited Korematsu v. U.S., 323 U.S. 214, 65 S. Ct. 193 (1944) as "the only instance in the constitutional jurisprudence of this country (where)... the Supreme Court upheld the preventative detention of competent adults prior to conviction of any crime" and cited Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal 1984) which case made questionable whether preventative detention based upon presumption would be valid today, even under those facts.

Federal Court have held presumptions invalid as violations of criminal due process. See, for example, Commonwealth of Pennsylvania v Franklin, April 29, 1985, ___US___, 105 S. Ct. 1965 (a jury charge whereby defendant may rebut a presumption regarding intent violates the Fourteenth Amendment's due process clause). See also Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532 (1969) (The presumption in 21 U.S.C. 176 (a) whereby a possessor of marijuana is presumed to know of its unlawful importation violated the due process clause).

Although the Act is triggered by a criminal charge, it results in civil detention. Presumptions have also been held to violate the less stringent

constitutional requirements of civil due process. See Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332 (1958) [Requirements that taxpayer to win tax exemption, rebut presumption that he/she intends overthrow of Federal and/or State government by unlawful means held violative of Fourteenth Amendment due process]; Oyama v. State of California, 332 U.S. 633, 68 S. Ct. 269 (1948) [California alien land law whereby only aliens are presumed unable to transfer land to offspring held unconstitutional under Fourteenth Amendment]; Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972) [Presumption that unwed fathers are per se neglectful and, thereby, denied custody of their natural children deemed due process violation]; Heiner

v. Donnan, 285 U.S. 312, 52 S. Ct. 358 (1932) [Presumption that gifts made within two years of death are taxable as gifts made in contemplation of death violates due process).

It is urged that the Act's presumption, which can result in the loss of freedom, a most fundamental right, even more clearly violates due process.

4. Whether the United States Supreme Court should hold "the Act" unconstitutional when pretrial detention may be wholly founded upon oral testimony which can be rejected by the Court, thus allowing detention based upon a conclusive presumption?

The Act provides for a detention hearing (3142 (f)). Pretrial detention is ordered if the Court holds

the presumption unrebutted and presumes that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community..."

The Act does not require any written evidence. Therefore, oral testimony, alone, may be used to support the defendant's future capacity for dangerousness or for flight.

Even if this Court sets a national definition for the term "presumption", there is strong opposition to the use of even a rebuttable presumption as violative of due process.

Basic to the law of evidence is the rule that the court may totally reject even uncontroverted oral testimony

which it views as inherently improbable, unreasonable or questionable. See Quock Ting v. United States, 140 U.S. 417, 11 S. Ct. 733 (1891); Wooley v. Great Atlantic and Pacific Tea Company, 281 F.2d 78 (3rd Cir. 1960); Rhoades Inc. v. United Airlines Inc., 340 F.2d 481 (3rd Cir. 1965); Jones v. N.V. Nederlandsch-Amerikaansche Stoomvaart Maatshappij, 374 F.2d 189, 191 (3rd Cir. 1967). Wigmore noted this principle: The mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner". 7 Wigmore on Evidence, 3034 at 260-261 (3d ed. 1940). Further, the right to reject oral testimony is particularly appropriate when composed of opinion (testimony). See Wooley, 281 F.2d at 80.

If oral testimony is rejected, the presumption alone, already held violative of due process by many courts and triggered only by a charge under two federal acts [3142 (e)], will result in pretrial detention. It is especially likely that such oral testimony will be rejected (thereby foreclosing the possibility of rebutting the presumption) in cases under the Act. It is probable that judicial officers will discard the oral testimony of persons charged with serious firearms or drug offenses who have, as well, prior criminal records since the reliability of such testimony would be deemed "questionable" by most people.

In addition, as stated in Wooley, 281 F.2d at 80, opinion testimony

is particularly subject to rejection. Detention hearings under the Act are largely composed of opinions regarding the defendant's future conduct. In the instant case, the detention hearing was almost totally composed of oral testimony.

Since oral testimony largely constitutes detention hearings and is likely to be rejected under the Rules of Evidence, the Act's presumption, rebuttable in theory, becomes a conclusive presumption, in practice. It is urged that the Act is both overinclusive and a violation of due process. Since the Act calls for civil detention, thus eliminating the more stringent procedural safeguards requred in a criminal hearing [3142 (f)], there

is even greater danger in allowing these presumptions to stand.

In determining the constitutionality of the Act [3142 (e)], the words of In Re Winship, 397 U.S. 358, 372, 70 S. Ct. 1068, 1077 (1970) are instructive: "...it is far worse to convict an innocent man than to let a guilty man go free".

CONCLUSION

For the foregoing reasons, the Bail Reform Act, 18 USCA § 3142 (e), should be declared unconstitutional.

Respondents plus Howard Perry should no longer be detained under its provisions.

Respectfully submitted,

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